sion.——THE LORDS found this exception relevant, and preferred the public in- No 90.
infeftment posterior to the pursuer's prior infeftment, in respect of the preceding contract of marriage, and inhibition executed before the pursuer's right and possession had, conform to the public right; which exception, founded upon the prior inhibition, was received in this same judgment: And the LORDS found no necessity that the defender should be put to reduce the pursuer's right, upon the ground of that anterior inhibition, but received the same in this action; albeit the pursuer replied, that his infeftment, clad with possession, could not be so summarily taken away by the said inhibition; neither could the possession alleged by the defender be respected; because the lands falling in ward by the decease of his author, and the ward being only expired this year controverted, whatever possession was acquired from the donatar of the ward, who was conjunct person, friend, and kinsman to the defenders, ought not to be respected in the pursuer's prejudice; but the matter ought to be handled as if the parties were disputing before the ward fell; at which time the pursuer was in actual possession of his annualrent; which answer was not respected, but the public infeftment, contract, and inhibition, and possession, and exception proponed thereupon, were admitted, as said is.

Act. *Hope & Baird.* Alt. *Aiton.* Clerk, *Gibson.*

Fol. Dic. v. 1. p. 177. Durie, p. 188.

1628. *July 29.* MITCHELSON *against* KER.

No 91.
In an action for mails and duties, two comprisers competing, who were both infeft, but neither had obtained possession, the Lords sustained a nullity proponed by the one against the other's comprising, by way of exception.

IN this action, two comprisers, who were both infeft in the lands, contending for the mails and duties thereof; and having convened the tenant therefor, and the last compriser proponing nullity of the other party's comprising and infeftment, albeit prior to his; which nullity, the LORDS finding was receiveable, *etiam hoc ordine*, without reduction, where none of the parties alleged possession, thereby to claim the benefit of a possessory judgment, but were in present dispute for the possession, that by virtue of their rights, he having the best right, might be authorised to possess, whereby the party against whom the nullity was proponed, was forced to allege possession by virtue of his right, and consequently that the nullity could not be received but by way of action, which possession he qualified, in so far as the tenant convened bruiked the land by his tolerance; 2*do*, That the tenant and the said compriser verbally agreed together, to pay to the said compriser 20 shillings yearly for the said lands, and which duty the tenant had paid diverse years since his right; neither of these qualifications was found relevant, viz. tollerance to bruik, which the LORDS found no possession in the compriser's person, neither verbal setting, for 20 shillings each year, of land estimate yearly at 500 merks, which was to be suspected in a compriser, who is presumed in law, if he had not intended fraud and prejudice to other

No 91. creditors, would not have set the land so far within the worth; and so the nullity was received by way of exception, notwithstanding of the foresaid answer and qualification of possession.

Act. *Craig.* Alt. ——. Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 177. *Durie, p.* 395.

1664. *June* 17. TULLIALLAN and CONDIE *against* CRAWFURD.

No 92.
A discharge which had been rejected in a suspension, but extract superseded to give time to instruct it; not being instructed within the time, was not afterwards, when instructed, received in defence against a declarator of an apprising.

TULLIALLAN and CONDIE pursue a declarator of an apprising led against them, as satisfied and paid within the legal, by intromission, and as an article adduce a discharge of a part of the sum apprised. The defender *alleged*, That the allegeance was not now competent, because it was *res judicata*, before the Lords of Council and Session, in *anno* 1637, where the same allegeance being proponed in a suspension,

THE LORDS found not the same instructed, and therefore found the letters orderly proceeded, yet conditionally superseding execution of the decreet till such a day, that, in the mean time, if the same were instructed, the instructions should be received; and nothing was produced during that time, so that it cannot be received more than 27 years thereafter to take away an apprising clad with long possession, and now in the person of a singular successor.

The pursuer *answered*, That his declarator, founded upon the said article, was most just and relevant, it being now evident, that the sum apprised for was paid in part; and as for the point of formality, albeit in ordinary actions, where terms are assigned to prove, and so a competent time granted to search for writs, if certification be admitted regularly, it is valid, and yet, even in that case, the LORDS will repone, upon any singular accident, in a suspension, *ubi questio non est de jure, sed de executione.*

THE LORDS would not delay execution unless the reasons be instantly verified; Yet *in petitione* will not take away the right.

THE LORDS sustained the defence, and would not sustain the foresaid article, in respect of the decreet *in foro contradictorio*, though, in a suspension here, there was no allegeance that the writs were new come to knowledge, or newly found, nor could be, because it was alleged in the decreet.

Stair, v. 1. *p.* 200.

1671. *November* 29. JUSTICE *against* BOYD.

No 93.
It was not found competent by exception, but

THERE being a wadset granted by Ludovick Keir to Dr Scot, the right of the wadset was apprised by John Boyd, who pursues the tenants for mails and duties. Compearance is made for Bailie Justice, deriving right from the reverser,